IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3107 OF 2005

Smt.Vimal Pratapsingh Pardeshi & Ors. ...Petitioners
V/s.
Dr.Uday Ganpatrao Naik & Anr. ...Respondents

Shri D.M. Gupte for the Petitioners.
Shri N.V. Vachalekar for the Respondents.

CORAM : V.M. KANADE, J.

DATED : MARCH 7, 2007

P.C. :-

1. Heard the learned Counsel for the petitioners and the learned Counsel for the respondents.

2. The petitioners take exception to the order passed by the Small Causes Judge, Pune, dated 23rd February, 2005 whereby the trial court was pleased to condone the delay for bringing the heirs on record and directed that the legal representatives of the deceased-defendant be taken on record.

3. The learned Counsel for the petitioners submits that no separate application for setting aside the abatement of the suit was filed by the plaintiff and

therefore, the impugned order condoning the delay and directing the legal representatives be brought on record, is illegal. He submitted that the provision for setting aside abatement merely stipulate that a separate application has to be filed and therefore, merely because the delay is condoned in filing the application, that by itself would not be sufficient for bringing the heirs on record.

4. The learned Counsel for the respondents submits that an application had been filed for bringing heirs on record and that a separate application for setting aside abatement was not made, the said application itself should be treated as an application for setting aside for an abatement of the suit.

5. The submission made by the learned Counsel for the petitioners cannot be accepted. The Apex Court in the case of **Mithailal Dalsangar Singh v. Annabai Devram Kini reported in (2003) 10 SCC page 691)** has held that a separate application for setting aside abatement need not be filed if application for bringing LRs on record

is filed. The Apex Court in para 8 has observed as under :-

> "Inasmuch as the abatement results in denial of hearing on the merits of the case, the provision of abatement has to be construed strictly. On the other hand, the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be considered liberally. A simple prayer for bringing the legal representatives on record without specifically praying for setting aside of an abatement may in substance be construed as a prayer for setting aside the abatement. So also a prayer for setting aside abatement as regards one of the plaintiffs can be construed as a prayer for setting aside the abatement of the suit in its entirety. Abatement of the suit for failure to move an application for bringing the legal representatives on record within the prescribed period of limitation is automatic and a specific order dismissing the suit as abated is not called for. Once the suit has abated as a matter of law, though there may not have been passed on record a specific order dismissing the suit as abated, yet the legal representatives proposing to be brought on record or any other applicant proposing to bring the legal representatives of the deceased party on record would seek the setting aside of an abatement. A prayer for bringing the legal representatives on record, if allowed, would have the effect of setting side the abatement as the relief of setting aside abatement though not asked for in so many words is in effect being actually asked for and is necessarily implied. Too technical or pedantic an approach in such cases is not called for."

6. In the present case also, though an application for bringing heirs on record was separately filed, a separate prayer for setting aside abatement has not been made. In view of the ratio of the judgment laid down by the Supreme Court in the aforesaid case, the prayer for setting aside abatement is implicitly made that one has to read the prayer for bringing heirs on record.

7. It is also submitted that no sufficient cause has been made out for condonation of delay. This submission also cannot be accepted as the trial court has considered the cause given by the plaintiff for bringing the heirs on record and explained the delay sufficiently. Under the circumstances, there is no reason to interfere with the impugned order.

8. Writ Petition therefore, is dismissed.

9. The trial Court is directed to decide the suit, as expeditiously as possible.

(V.M. Kanade, J.)